No. 82-1724

IN THE

Supreme Court of the United States

October Term, 1983

STATE OF NEW YORK,
Petitioner,

vs.

ROBERT UPLINGER and SUSAN BUTLER,
Respondents.

ON WRIT OF CERTIORARI TO THE
NEW YORK STATE COURT OF APPEALS.

BRIEF FOR RESPONDENT SUSAN BUTLER

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Question Presented

Does New York Penal Law §240.35 subd. 3 violate established New York case law dealing with loitering statutes, and does it violate the void-for-vagueness doctrine under the Due Process Clause of the Fourteenth Amendment of the United States Constitution?

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Summary of Argument

Consistent with a long line of loitering cases which it previously decided, the New York Court of Appeals struck the statute in question. The language of the Memorandum decision below, when viewed against the impressive weight of New York authority which exists in this area, makes it clear that the Court of Appeals' determination was premised upon the statute's vagueness.[1]

Ignoring the New York precedent, Petitioner has focused upon a number of "compelling state interests" which it claims the statute in question was designed to protect. It is respectfully submitted that in taking this approach, Petitioner's presentation of this case is not properly focused.

The focus must be on the wording of the statute itself, not upon the compelling state interests with which Petitioner deals so extensively. If the statute is found to violate the void-for-vagueness doctrine under the Due Process Clause of the Fourteenth Amendment, compelling state interests become irrelevant. No matter how compelling the state interest, it cannot save a statute which is unconstitutionally vague. It becomes a futile effort to consider what the State can or cannot prohibit, if one cannot know from reading the statute what conduct is, and what conduct is not, forbidden.

The State, with no statutory or other legal authority, has interpreted the statute in question as prohibiting, among other things, the "offensive" solicitation of

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[1] In light of this strong New York precedent, this Court might well decide to dismiss the writ of certiorari herein as improvidently granted.

"deviate" sex, when, in fact, it is a "loitering" statute which is totally silent about "offensive" solicitation (not to mention the fact that it does not require any solicitation at all). In effect, the State insists upon reading into the statute elements which plainly do not exist, confusing the statute's elements with the proof that may be offered in a given case to establish those elements.

The fatal flaw in Petitioner's argument can be summarized thusly: the State complains about "offensive" conduct and its harmful effect on society, and casually concludes that the statute in question is designed to prevent that "offensive" conduct, all the time ignoring the statute's vagueness.

In an effort to clarify the real issue which exists, Respondent Butler concedes at the outset that the public does have a right to not be exposed to *offensive* solicitations for deviate sex. However, and this is where the battle line is drawn, that right must be protected by a properly drafted statute, unlike the one presently before this Court.

The Court of Appeals' disposition of this case is consistent with the decisions of this Court which have applied the void-for-vagueness doctrine. Other constitutional considerations aside, because the statute's imprecision and failure to provide reasonably clear guidelines create a grave danger of arbitrary enforcement, it must not be allowed to stand.

ARGUMENT

New York Penal Law §240.35 subd. 3 violates established New York case law dealing with loitering statutes, and violates the void-for-vagueness doctrine under the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The decision of the Court of Appeals is readily understood if examined in the light of firmly established legal precedent in the State of New York. *In People v. Diaz*, 4 N.Y. 2d 469, 176 N.Y.S. 2d 313, 151 N.E. 2d 871 (1958), the Court of Appeals considered a Dunkirk City Ordinance which provided that "No person shall lounge or loiter about any street or street corner in the City of Dunkirk." Striking the ordinance on vagueness grounds, the court reasoned thusly:

> While the term "loiter" or "loitering" has by long usage acquired a common and accepted meaning (*People v. Bell*, 306 N.Y. 110), it does not follow that by itself, and without more, such term is enough to inform a citizen of its criminal implications and, by the same token, leave it open to arbitrary enforcement. *Id.*, at 470.

As a precursor of cases to follow, the court noted that "Whenever a conviction for loitering has been upheld, it is because the statute uses the term 'loiter' or 'loitering' to point up the prohibited act, either actual or threatened." *Id.*, at 471.

The development of New York's case law in this area established that where a statute combined loitering with an ultimate act which the Legislature had a legitimate purpose in prohibiting (such as prostitution in *People v. Smith*, 44 N.Y. 2d 613, 407 N.Y.S. 2d 462, 378 N.E. 2d 1032 (1978), and using narcotic drugs in *People v. Pagnotta*, 25 N. Y. 2d 333, 305 N.Y.S. 2d 484, 253 N.E.

2d 202 (1969)), or where the scope of a statute prohibiting loitering was specifically limited to designated places where loitering, as such, might pose a danger to the public order or to the public safety (such as railroad stations in *People v. Bell*, 306 N.Y. 110, 115 N.E. 2d 821 (1953), the waterfront facility of the Port of New York in *People v. Merolla*, 9 N.Y.2d 62, 211 N.Y.S. 2d 155, 172 N.E.2d 541 (1961) and school buildings in *People v. Johnson*, 6 N.Y. 2d 549, 190 N.Y.S. 2d 694, 161 N.E.2d 9 (1959)), New York has consistently allowed the statute to stand.[2]

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[2] This position was succinctly set forth in *People v. Berck*, 32 NY2d 567, 570-571, 347 N.Y.S. 2d 33, 300 N.E. 2d 411 (1973), as follows:

> The loitering statutes which we have upheld against attack on the ground of vagueness are altogether different from the sort of provision here challenged. (See, e.g., *People v. Pagnotta*, 25 N Y 2d 333, *supra*; *People v. Merolla*, 9 N Y 2d 62; *People v. Johnson*, 6 N Y 2d 549; *People v. Bell*, 306 N. Y. 110.) In each of the cited decisions, the statutes before the court were sustained either because they clearly 'point[ed] up' the prohibited act (e.g., *People v. Diaz*, 4 N Y 2d 469, 471, *supra*; *People v. Pagnotta*, 25 N Y 2d 333, *supra*) or else restricted loitering only at specific facilities where the likelihood of illegal activity was notorious (e.g., *People v. Merolla*, 9 N Y 2d 62, *supra*; *People v. Johnson*, 6 N Y 2d 549, *supra*; *People v. Bell*, 306 N. Y. 110, *supra*). For instance, in *Pagnotta* (25 N Y 2d 333, 338, *supra*), we sustained a provision of the former Penal Law making it illegal to loiter about any 'stairway, staircase, hall, roof, elevator, cellar, courtyard or any passageway of a building for the purpose of unlawfully using or possessing any narcotic drug'. And, in the *Merolla* case (9 N Y 2d 62, 66, *supra*), we held valid a provision of the Waterfront Commission Act which forbade loitering 'upon any vessel, dock, wharf, pier, bulkhead, terminal, warehouse, or other waterfront facility'. The statute involved in *Merolla* (9 N Y 2d, at pp. 66-68), we observed in that case, dealt with loitering at 'specific facilities' which were notorious for 'the evils which * * * pervaded the area'. Quite obviously, such specificity of the prohibited conduct is totally lacking in the statute before us.

It is against this impressive weight of authority that the Court of Appeals, citing its decision in *People v. Onofre*, 51 N.Y. 2d 476, 434 N.Y.S. 2d 947, 415 N.E. 2d 936 (1980), cert. den. 451 U.S. 987, 68 L. Ed. 2d 845, 101 S.Ct. 2323 (1981), held below that:

> "... The object of the loitering statute is to punish conduct anticipatory to the act of consensual sodomy. Inasmuch as the conduct ultimately contemplated by the loitering statute may not be deemed criminal, we perceive no basis upon which the State may continue to punish loitering for that purpose." *People v. Uplinger and Butler*, 58 N.Y. 2d 936, 938, 460 N.Y.S. 2d 514, 447 N.E. 2d 62 (1983).

This was a tacit recognition by the Court of Appeals that, as originally drafted, the section in question was designed to punish inchoate activity leading up to what was then a crime under section 130.38 of the New York Penal Law (*i.e.*, consensual sodomy). Since, in the wake of *People v. Onofre, supra*, consensual sodomy was no longer criminal, merely loitering for that legal purpose, without more, could no longer be condemned.

With specific reference to the second aspect of New York's loitering precedent—*i.e.*, where loitering can be prohibited in specific places to protect public order or safety—the Court of Appeals stated:

> "...We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner *or in an inappropriate place* even if the underlying purpose is not a violation of law. The Legislature could also prohibit solicitation for the purpose of performing the object conduct *in a public place*. On the contrary, statutes of this general nature *when properly drafted* have been upheld by the courts." *People v. Uplinger and Butler, supra*, at 938 (emphasis supplied).

It is clear from the quoted language that the Court of Appeals struck down the instant loitering statute on vagueness grounds construed under principles of State law. This conclusion is reinforced by other passages of the Court of Appeals' decision, to wit:

> "...*Because the statute itself is devoid of a requirement that the conduct proscribed be in any way offensive or annoying to others*, the challenged statute cannot be categorized as a harassment statute.
>
> * * *
>
> However, *it is apparent from the wording of this statute* that it was aimed at proscribing overtures, not necessarily bothersome to the recipient, leading to what was, at the time the law was enacted, an illegal act." *People v. Uplinger and Butler, supra*, at 938 (emphasis supplied).

This finding of vagueness by New York's Court of Appeals under principles of State law is in total accord with the decisions of this Court. In a recent decision which struck down a California loitering statute, Justice O'CONNOR summarized the void-for-vagueness doctrine thusly:

> "...As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. Village of Hoffman Estates v. Flipside, 455 US 489, 71 L Ed 2d 362, 102 S Ct 1186 (1982); Smith v. Goguen, 415 US 566, 39 L Ed 2d 605, 94 S Ct 1242 (1974); Grayned v. City of Rockford, 408 US 104, 33 L Ed 2d 222, 92 S Ct 2294 (1972); Papachristou v. City of Jacksonville, 405 US 156, 31 L Ed 2d 110, 92 S Ct

> 839 (1972); Connally v. General Construction Co., 269 US 385, 70 L Ed 322, 46 S Ct 126 (1926). Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.' Smith, supra, at 574, 39 L Ed 2d 605, 94 S Ct 1242. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' Id., at 575, 39 L Ed 2d 605, 94 S Ct 1242 (footnote reference deleted)." *Kolender v. Lawson*, _____ U.S. _____, 75 L. Ed. 2d 903, 909, 103 S. Ct. 1855 (1983).

Significantly, as this passage clearly demonstrates, the potential for arbitrary enforcement is the primary concern in this area.

With these principles in mind, attention is now directed to the statute itself, which provides that an individual is guilty of loitering when he "Loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature; . . ." New York Penal Law, §240.35 subd. 3.

Initially, attention will be paid to that portion of the statute which refers to "other sexual behavior of a deviate nature." Petitioner candidly admits that that phrase is not statutorily defined, but then claims that by "common usage" it is understood "as sexual conduct 'characterized by or given to significant departure from the behavorial norms' of society", citing *Webster's Dictionary* as authority for its position.[3] Unfortunately,

[3] Brief for Petitioner 11.

far from providing a precise guideline, *Webster's* definition is itself unacceptably vague. Thus, what kind of sexual conduct represents a "significant departure from the behavorial norms" of society? The answer to this query would undoubtedly vary from police officer to police officer and is the very evil upon which the vagueness doctrine focuses.[4]

In addition, the State, without any statutory authority or legislative history to support its position, maintains that the phrase "other sexual behavior of a deviate nature" ". . . includes acts of bestiality and necrophilia (see Penal Law §130.20 subd. 3), acts involving the insertion of a foreign object into the vagina, urethra, penis or rectum (see Penal Law §130.70), acts of sexual sadism or masochism (see Penal Law §§120.00, 120.05 and 120.10 dealing with assault; see also Penal Law Article 130 specifically as it deals with offenses against those who are unable to consent due to age or mental deficiency), all unquestionably 'deviate' by any definition."[5] New York courts have never construed the phrase "other sexual behavior of a deviate nature" the way Petitioner does. However, assuming *arguendo* that the phrase in question does include the conduct referred to by Petitioner, that fact, far from overcoming the statute's vagueness, only serves to emphasize it. Hence, while "other sexual behavior of a deviate nature" *might* include bestiality, necrophilia, etc., that is not to say

[4] See *Smith v. Goguen*, 415 U. S. 566, 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974), where this Court, referring to Mr. Justice BLACK'S concurring opinion in *Gregory v. City of Chicago*, 394 U. S. 111, 120, 22 L. Ed. 2d 134, 89 S. Ct. 946 (1969), expressly shared his concern "against entrusting lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' "

[5] Brief for Petitioner 11.

that the phrase, by definition, is *specifically limited* to those acts. Conceptually, when analyzing vagueness, this is an important distinction: while certain conduct *may be included* in a phrase, that does not mean that the phrase in question is definitionally limited to that conduct. Because it is not so precisely restricted, this is where the vagueness becomes manifest.

By way of example, assume that a police officer happens upon an unmarried couple in a public place and observes the man's mouth on the female's breast. While a seasoned veteran might think nothing of this, and merely tell the couple to move along, a "rookie" who just left the seminary might find such conduct between an unmarried couple "deviate" and arrest them. Moreover, while a police officer might not consider such conduct "deviate" between an unmarried, heterosexual couple, he might consider it "deviate" if engaged in by a homosexual couple.[6]

Totally unclear, in light of New York's statutory scheme, is whether a married couple could ever engage with one another in "other sexual behavior of a deviate nature," and thereby run the risk of violating the loitering statute. By definition, a married couple cannot engage in "deviate sexual intercourse."[7] But let us assume that their conduct does not involve mouth to

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[6] These examples conclusively demonstrate why this Court has insisted upon "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith v. Goguen, supra*, at 574.

[7] New York Penal Law §130.00, subd. 2 provides the following definition:

> "Deviate sexual intercourse" means sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva.

penis, penis to anus, or mouth to vulva contact. Assume, using the State's example, that it involves "the insertion of a foreign object into the vagina, urethra, penis or rectum (see Penal Law §130.70)". Even accepting Petitioner's contention that such conduct is "unquestionably 'deviate' by any definition",[8] is it "deviate" for a married couple? Since their married status exempts them from the classification of "deviate sexual intercourse," does it not also exempt them from "other sexual behavior of a deviate nature"? No answer exists to this question, not in New York's statutory scheme nor in its case law. Clearly, the very imprecision of the phrase, "other sexual behavior of a deviate nature," places "unfettered discretion" in the hands of the police officers who must enforce it, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972), and is, therefore, unconstitutionally vague.

Excising this objectionable portion, the statute is reduced to condemning a person who "loiters or remains in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse. . . ." Of course, as noted by the Court of Appeals, on the heels of *People v. Onofre, supra*, the statute proscribes loitering for the purpose of engaging in or soliciting what is now in New York a lawful act. For that reason alone, when viewed against the weight of authority in New York, the statute must fall.[9]

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[8] Brief for Petitioner 11.

[9] See pages 3-6, *supra*. Of particular relevance in light of *Onofre* is the language, quoted above, from *People v. Diaz, supra*, at 471: "Whenever a conviction for loitering has been upheld, it is because the statute uses the term 'loiter' or 'loitering' to point up the *prohibited* act, either actual or threatened." (Emphasis supplied.)

However, further analysis will serve to demonstrate, conclusively, the statute's constitutional deficiencies. The State's concerns about the public order, about offensive solicitations made to unreceptive solicitees, and about "undeniably lewd" speech "forced upon another in a public place" notwithstanding, this conduct that the State objects to is not even referred to under the statute's proscriptions. The State, as did the lone dissenter at the Court of Appeals, persists in confusing the elements of the crime with conduct which might be used in a given case to establish those elements.

Solicitation, discreet or otherwise, "lewd" or otherwise, is not what this loitering statute bans. This statute bans loitering in any public place in the State with the thought (however fleeting) of engaging in, or asking another to engage in, deviate sexual activity. The statute requires no conduct other than that (*i.e.*, mere thought) for the State to arrest, charge, and incarcerate an individual.[10]

However, even if the statute specifically required that actual words be spoken to another, the vagueness problem is not cured.[11]

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[10] In striking down an almost identical statute, the Colorado Supreme Court, ruling that the statute did not satisfy constitutional due process requirements, reasoned thusly: "The statute fails to require the loitering to be coupled with any other overt conduct. Rather, the loitering need only be coupled with the state of mind of having 'the purpose of engaging or soliciting another person to engage in . . . deviate sexual intercourse.' " *People v. Gibson*, 184 Col. 444, 521 P. 2d 774, 775.

[11] Respondent Butler does not concede that the wording of the statute *requires* that actual words be spoken (*i.e.*, that a "solicitation" occurs). However, even giving the State the benefit of reading into the statute what it does not, on its face, prohibit (*i.e.*, "offensive" solicitation), the statute would still be unconstitutionally vague.

If it is the State's contention that all solicitations for deviate sex are *per se* offensive, that position is untenable. While such solicitations might be offensive to some, they are clearly not offensive to all. In an Opinion striking down a Cincinnati, Ohio, ordinance which made it a criminal offense for "three or more persons to assemble ... on any of the sidewalks ... and there conduct themselves in a manner annoying to persons passing by ...", Mr. Justice STEWART specifically addressed this issue:

> "Conduct that annoys some people does not annoy others. Thus, the ordinance is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.' Connally v. General Construction Co., 269 U.S. 385, 391, 70 L.Ed. 322, 328, 46 S. Ct. 126." *Coates v. Cincinnati*, 402 U.S. 611, 614, 29 L.Ed. 2d 214, 91 S. Ct. 1686 (1971).

Ironically, the Cincinnati statute at least used the words "in a manner annoying to persons passing by...", while the New York statute is absolutely silent in this respect.

The statute leaves many questions about enforcement unanswered. Thus, can only the person solicited complain, or can anyone who hears the solicitation complain? (Petitioner apparently is of the view that it applies to both in referring to the "unwilling solicitee and the unwilling bystander."[12]) What if the solicitation is not offensive to the solicitee but is offensive to the bystander; can the bystander still complain? What if the solicitation is offensive to neither the solicitee nor the bystander, can the patrolman on his beat nevertheless make an arrest? In other words, upon whose sensitivity does a violation depend? *Coates v. Cincinnati, supra; cf.*

[12] Brief for Petitioner 8.

Chaplinsky v. New Hampshire, 315 U. S. 568, 86 L. Ed. 1031, 62 S. Ct. 766.

Using the State's phrase, does the solicitation have to be "undeniably lewd",[13] or is it enough if it gets the point across without employing offensive language? Stated otherwise, is the focus on the actual language used, or on the mere fact that a solicitation, however harmless, has occurred? The statute sheds no light whatsoever on these questions.

Furthermore, if, as the State would urge, the focus is on offensive solicitation,[14] what would the criminal

[13] *Ibid.* Again, the State insists upon reading into the statute an element which does not exist. The statute makes no mention of "lewd" solicitations. And to the extent that mere solicitations (not necessarily lewd or offensive) are outlawed, there are First Amendment implications which bear on the vagueness issue. "... perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply (footnote reference deleted)." *Village of Hoffman Estates v. Flipside*, 455 U. S. 489, 499, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982).

[14] For all the State's concern about offensive solicitations and the necessity of having this statute to protect the public from being subjected to them, the statute, ironically, would not punish a male who approaches a female stranger in a public place and, in the presence and hearing of twenty people, says to her, "Do you want to f—?" On the other hand, the statute, to the State's apparent satisfaction, would punish a male who discreetly asks his female friend in a public place if she would like to go to his apartment and engage in oral sex. If the State is of the opinion that New York has statutes which punish the former (see Brief for Petitioner, 27-28), then New York certainly does not need this statute to punish the latter (assuming, only for the sake of argument, that the latter conduct is not otherwise constitutionally protected). It is clear from Petitioner's emphasis on "offensive" solicitations that the State is concerned about the manner in which such solicitations are made; yet, the statute is conspicuously silent about the nature of the solicitation, a fact expressly referred to by the Court of Appeals in reaching its decision.

liability be in this situation? M (a male) and F (his female friend), having spent an intimate night together at F's apartment where they engaged in "deviate sexual intercourse", plan to meet at noon the next day in the park. M arrives first and wanders about (*i.e.*, "loiters") while waiting for F, preoccupied with thoughts of the events of the previous evening. When F arrives, M says, "You were fantastic last night. Shall we go to my place and pick up where we left off?" Overhearing this, a police officer decides to follow, peers in the window of M's apartment, and sees them engaging in "deviate sexual intercourse." A literal reading of the statute indicates that M is subject to arrest because he loitered in a public place (the park) for the purpose of soliciting F to engage in "deviate sexual intercourse." But is this really the type of conduct which the Legislature intended to reach by this statute? The "solicitation" was totally innocuous, it was not "undeniably lewd", and the ultimate act took place in private, yet under the wording of the statute, M's remark in the park is criminal.[15]

As the above example illustrates, the statute, contrary to the State's view, is not limited in scope to acts which occur in public. If the solicitation, however innocuous, occurs in public and the sexual act in private, criminal charges can be brought.

It is Petitioner's position "that the object of the statute under consideration is regulation of behavior occurring in a public place."[16] However, this again demonstrates how the State chooses to ignore the precise wording of the statute. The statute forbids loitering or

[15] This calls to mind Mr. Justice DOUGLAS' comment in *Papachristou, supra*, at 163, concerning the Jacksonville ordinance: "[It] makes criminal activities which by modern standards are normally innocent."

[16] Brief for Petitioner 16.

remaining in a public place; but, it does not limit its application to the solicitation of, or actual engagement in, deviate sex in a public place. Thus, if a male loiters in a public place and invites a female back to his house with the specific purpose of asking her, when they get there, to engage in deviate sex, he has violated the statute. Contrary to Petitioner's view, the wording of the statute does not require that either the solicitation or the ultimate sex act occur in a public place. The Court of Appeals recognized this[17]; that Petitioner does not only serves to emphasize the statute's vagueness.

Even if the statute is construed to mean that it applies to deviate sexual intercourse engaged in in public places, it would still suffer from vagueness. Given the focus of the State's expressed concern (*i.e.*, conduct offensive to others), does the statute proscribe the following? Assume that A and B, an unmarried, heterosexual couple, go camping in a state park. They purposely seek out a remote spot thereof (a cave), and, enjoying the romantic intimacy of the moment, engage in deviate sex. Much to their chagrin and total embarrassment, a forest ranger on patrol discovers them. Undeniably, under the statute in question, they are guilty of loitering. But can it seriously be contended that the State has a compelling interest in prohibiting such conduct under these circumstances? (Not one of the compelling state interests cited by Petitioner has any application here.) The problem is that the statute merely provides a blanket proscription of all loitering or remaining in public, without in any way attempting to limit the words "in

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[17] "The Legislature could also prohibit solicitation *for the purpose of performing the object conduct in a public place.*" *People v. Uplinger and Butler*, *supra* (emphasis supplied).

public". Again, the Court of Appeals was aware of this problem.[18]

The statute is problematic in another respect, which was briefly discussed above. As worded, it describes an inchoate offense and consequently punishes mere thought. Thus, if a person loiters or remains in a public place with the express intention of engaging in or soliciting another to engage in "deviate sexual intercourse", he has committed the crime regardless of whether he ever actually engages in, or solicits another to engage in, "deviate sexual intercourse." That the thought entered his mind is enough to convict; that thought need not materialize into action (*i.e.*, the actual solicitation of, or engaging in, deviate sexual intercourse).[19] Appropriate, in this context, are the words of Mr. Justice Douglas, concurring in *Speiser v. Randall*, 357 U.S. 513, 536, 2 L. Ed. 2d 1460, 1479, 78 S. Ct. 1332 (1958): "What a man thinks is of no concern to government. 'The First Amendment gives freedom of mind the same security as freedom of conscience.'

[18] "We do not hold that the Legislature cannot enact a law prohibiting a person from accosting another in an offensive manner *or in an inappropriate place* even if the underlying purpose is not a violation of law." *People v. Uplinger and Butler, supra* (emphasis supplied). This Court has recognized that privacy interests do exist in public places and that such interests vary in intensity depending upon the nature of the public place involved: "... it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park...." *Cohen v. California*, 403 U. S. 15, 21, 29 L. Ed. 2d 284, 91 S. Ct. 1780 (1971). Finally, to whatever extent this example is construed to be an overbreadth argument (which doctrine was expressly rejected by the New York Court of Appeals as a basis for its holding), reference need only be made to Justice O'CONNOR'S statement in *Kolender v. Lawson*, *supra*, at 910, n. 8: "But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines."

[19] See *People v. Gibson*, *supra*, cited herein at p. 11, n. 10.

Thomas v. Collins, 323 U.S. 516, 531, 89 L.Ed. 430, 440, 65 S. Ct. 315."

The real danger of the statute lies in its use against only those individuals who are deemed "undesirable" by society: for example, against suspected prostitutes and suspected homosexuals. They, in effect, become "marked" individuals who are easy prey to the vagaries of the statute and its arbitrary enforcement by the police. Thus, a "known" prostitute, or a "known" homosexual, regardless of their innocent and lawful "loitering", can easily become the targets of discriminatory enforcement under such an imprecise statute. Because of their respective reputations, a casual conversation can be construed as an illegal solicitation and lead to an arrest.[20]

That arbitrary enforcement does occur was graphically exposed when Judge Drury posed the following hypothetical in Buffalo City Court:

> "... Let's say your officers or some officer found a couple in a park and there's no evidence of prostitution, they wouldn't be arrested, would they, male and female? They never have, have they?"

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[20] In effect, the statute permits punishment based upon status. This fact, coupled with Respondent Butler's earlier claim that the statute punishes mere thought, brings to mind the comments of Mr. Justice BLACK who, in a concurring opinion in *Powell v. Texas*, 392 U. S. 514, 543, 20 L. Ed. 2d 1254, 88 S. Ct. 2145 (1968), commented thusly upon this subject:

> "Punishment for a status is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a mere propensity, a desire to commit an offense; the mental element is not simply one part of the crime but may constitute all of it. This is a situation universally sought to be avoided in our criminal law; the fundamental requirement that some action be proved is solidly established even for offenses most heavily based on propensity, such as attempt, conspiracy, and recidivist crimes (footnote reference deleted)".

In reply, Captain Kenneth Kennedy, the officer in charge of the Buffalo Police Department's Bureau of Vice Investigation, gave this telling answer:

> "Depending on the circumstances generally—well, not if it would indicate that there were no involvement in prostitution but if they're in the area where there's prostitutes, where there's homosexuals or where we have complaints of people being disturbed and of these acts being committed where people can see them. . . ." Joint Appendix 8.

His message was clear: if you are not a prostitute or a homosexual, you will not be prosecuted under the statute.

Needless to say, the potential for arbitrary enforcement is astounding. One can envision a scenario where police roam about "Lovers' Lanes" shining their flashlights into the windows of cars parked there; and, depending not only upon *what* they observe, but, perhaps more importantly, upon *whom* they observe, make arrests under this statute. Because of the statute's imprecise terms, it "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.'" *Papachristou v. City of Jacksonville, supra*, at 170 (quoting from *Thornhill v. Alabama*, 310 U.S. 88, 97-98, 84 L. Ed. 1093, 1100, 60 S. Ct. 736). "Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections." *Smith v. Goguen, supra*, at 575.

The imprecision and utter vagueness of this statute becomes manifest when it is compared to §240.37 of the New York Penal Law, entitled "Loitering for the purpose

of engaging in a prostitution offense."[21] In upholding the validity of §240.37, the New York Court of Appeals, rejecting a claim of unconstitutionality premised upon vagueness, reasoned thusly:

> "The strength of defendant's assault on section 240.37 is diminished greatly by the presence therein of an element lacking in those enactments struck down and declared void for vagueness... That distinctive characteristic is the delineation of *specific* conduct, in addition to the loitering, which the arresting officer must observe. Thus, the statute explicitly limits its reach to loitering of a demonstrably harmful sort, *i.e.*, loitering for the purpose of committing a specific offense." *People v. Smith*, 44 NY 2d 613, 620, 407 N.Y.S. 2d 462, 378 N.E. 2d 1032 (1978) (emphasis supplied).

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[21] That statute provides as follows:

> 1. For the purposes of this section, "public place" means any street, sidewalk, bridge, alley or alleyway, plaza, park, driveway, parking lot or transportation facility or the doorways and entrance ways to any building which fronts on any of the aforesaid places, or a motor vehicle in or on any such place.
>
> 2. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article two hundred thirty of the penal law, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of sections 230.00 or 230.05 of the penal law.
>
> 3. Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of promoting prostitution as defined in article two hundred thirty of the penal law is guilty of a class A misdemeanor.

Obviously, the Court of Appeals could not say the same about the statute presently under scrutiny. Contrary to what the State insists upon reading into it, the statute delineates *no* "specific conduct, in addition to the loitering, which the arresting officer must observe." *Id.* Furthermore, as can be seen by the several examples previously alluded to, it cannot be said, as in *People v. Smith, supra*, that the instant statute "explicitly limits its reach to loitering of a demonstrably harmful sort . . . ."

Petitioner, on several occasions in its brief, refers to the compelling state interest of regulating prostitution.[22] That such a state interest exists is not disputed; however, what is particularly disturbing about the State's position in this regard is that New York has legislation which is specifically directed at loitering for the purpose of prostitution (*i.e.*, §240.37). The police officer made a conscious choice not to arrest Respondent Butler under that section, although he testified that he could have done so.[23] Instead, he arrested her under the instant statute, admitting that he knew about the *Onofre* decision.[24] In light of the officer's failure to arrest Respondent Butler under a statute specifically designed to prohibit loitering for the purpose of prostitution, a statute whose constitutionally had been upheld by the New York Court of Appeals,[25] Petitioner should not be heard to complain in this case about the State's compelling interest in regulating prostitution.

The following passage from the State's brief suggests its true purpose in seeking to have the instant statute upheld:

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[22] Brief for Petitioner 9, 19, and especially 21, 24.
[23] Joint Appendix 2.
[24] *Ibid.*
[25] *People v. Smith, supra.*

> "Although concededly there are other laws permitting the prosecution of deviate prostitution, it is submitted that such laws do not easily succumb to enforcement due to the problem of proving payment absent solicitation of an undercover police officer." Brief for Petitioner 19.

What the State apparently desires are two statutes to police the same conduct, one suitably vague (*i.e.*, §240.35 subd. 3) which can be used to avoid the proof requirements of the other (*i.e.*, §240.37). Suffice it to say, the arsenal of the police must not be increased with legislation of this ilk.[26]

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[26] Summary treatment will be accorded to the State's contention that Respondent Butler lacks standing to attack the statute on vagueness grounds. In the first place, Petitioner never questioned her standing before the New York Court of Appeals. Not having done so, the State should not be heard to complain about her standing at this stage of the proceedings.

Furthermore, contrary to the State's position in this regard, the record below does not establish that Respondent Butler's conduct "is clearly embraced within the statute." Brief for Petitioner 33. Because, by its terms, the statute punishes mere thought, who can say, absent any proof of the content of her alleged solicitation (Joint Appendix 4), what Respondent Butler was thinking while waiving at passing cars? For all that the record establishes, she might have been loitering "for the purpose of" soliciting conventional sexual intercourse, only to later give in to her partner's stated preference for "deviate" sexual activity. Thus, while her conduct clearly fell within the ambit of Penal Law §240.37 and thereby satisfied the notice requirement demanded by due process with respect to that statute, the same cannot be said regarding Penal Law §240.35 subd. 3, precisely because of that statute's facial vagueness.

Finally, for all of the State's concern about "lewd" solicitations which offend the public's sensibilities, the record contains no proof whatsoever that Respondent Butler was soliciting in a lewd manner or that her conduct offended anyone. Indeed, the accusatory instrument did not charge her with either "lewd" or "offensive" solicitation, alleging merely that she "did loiter and remain in a public place ... for the purpose of engaging, soliciting another person to engage in deviate sexual intercourse, in that the defendant Butler did loiter .... waiving to cars.... The defendant Butler did approach the [other] defendant['s] ... car had a conversation and entered car...." See Original Record.

As mentioned at the outset, the compelling state interests relied upon by the Petitioner cannot overcome the due process vagueness which infects this statute. To be sure, many of the problems which the State envisions in this area are real. It is up to the State's Legislature, however, to take up the Court of Appeals' invitation and draft legislation which deals with these problems in constitutionally acceptable language.

If it is the Petitioner's lament that a useful law enforcement tool will have been lost, the words recently spoken by this Court could not be more appropriate:

> "... The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity." *Kolender v. Lawson, supra,* at 911.

CONCLUSION

Under applicable New York Law and the principles of Due Process embodied in the Fourteenth Amendment of the United States Constitution, the judgment of the New York State Court of Appeals should be affirmed.

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